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NO. 98768-8

WASHINGTON SUPREME COURT

BRIAN GREEN,

Respondent,

v.

PIERCE COUNTY,

Appellant.

AMICUS CURIAE MEMORANDUM OF
WASHINGTON STATE ASSOCIATION OF BROADCASTERS,
RADIO TELEVISION DIGITAL NEWS ASSOCIATION AND
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

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I. INTRODUCTION

This case is the first to interpret the definition of “news media” in Washington’s shield law, RCW 5.68.010. The definition is limited to entities in the regular business of news gathering, including television and radio stations, cable networks, newspapers, magazines and other periodicals, and the employees and agents of those entities. The trial court applied the shield law to a man obtaining public records related to his own arrest with the possible intention of criticizing the arrest on his YouTube channel. In doing so, the trial court warned of unintended consequences that may result if the shield law is invoked by every self-identified journalist who regularly puts “news” on the Internet.

The Washington State Association of Broadcasters, Radio Television Digital News Association and Washington Newspaper Publishers Association strongly support the right to freely publish information and to obtain government records. This Court’s challenge is to protect open government and First Amendment values without rendering the shield law so unworkable as to invite its demise. Broadcasters, newspapers and other media entities need a workable journalist’s privilege to prevent intrusion into their newsrooms and to maintain actual and perceived independence from the government. This

Court should resolve this Public Records Act case by holding that records requesters are “news media” when requesting records in the scope of employment or reporting assignment by a qualifying media entity.

II. INTEREST AND IDENTITY OF AMICUS PARTIES

The Radio Television Digital News Association (RTDNA) is the world's largest professional organization devoted exclusively to broadcast and digital journalism. Founded as a grassroots organization in 1946, RTDNA’s mission is to promote and protect responsible journalism. RTDNA defends the First Amendment rights of electronic journalists throughout the country, honors outstanding work in the profession through the Edward R. Murrow Awards and provides members with training to encourage ethical standards, newsroom leadership and industry innovation.

The Washington State Association of Broadcasters (WSAB), founded in 1935, represents over 250 commercial and public radio and television stations statewide. Among its many purposes is to protect and promote the interest of the broadcasting industry, including the ability of broadcast journalists to gather and disseminate information in a manner that is unimpeded by government or other influence.

The Washington Newspaper Publishers Association (WNPA) is an advocate for community newspapers, freedom of the press and open government. WNPA represents about 75 community newspapers in Washington state. It is the successor to the Washington Press Association, founded in 1887 by newspapers in Dayton, Ellensburg, Seattle, Tacoma, Yakima and Walla Walla.

RTDNA, WSAB and WNPA (“Amici”) are interested in this case because, although it arises under the Public Records Act, it is the first to interpret the definition of “news media” in the shield law. Amici need the shield law to maintain its integrity so that journalists can do their important work without government interference. The City of Seattle’s current effort to obtain unpublished videos of protesters from KING, KIRO, KOMO, KCPQ and The Seattle Times illustrates the importance of a strong shield law. Amici have an interest in ensuring that the laws are interpreted as the Legislature intended, without pitting open government interests against freedom of the press.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case on pages 2 to 4 of the Amicus Curiae Memorandum of Allied Daily Newspapers of Washington.

IV. ARGUMENT

The shield law is an evidence law. RCW 5.68.010. It prevents litigants and courts from compelling “the news media” to disclose sources or to produce information obtained in news gathering. RCW 5.68.010(1). In the 13 years since its adoption RCW 5.68.010 has rarely been litigated, and has resulted in only one published opinion, *Republic of Kazakhstan v. Doe*, 192 Wn.App. 773, 368 P.3d 524 (2016).

A party may overcome the statutory media privilege only with “clear and convincing evidence” that: a) there are reasonable grounds to believe a crime occurred or there is a prima facie cause of action; b) the information sought is “highly material and relevant” and “critical or necessary” to proving a material issue or maintaining a claim or defense; c) the party has exhausted “all reasonable and available means” to obtain the information from alternative sources; and d) there is a compelling public interest in the disclosure of the media’s protected information. RCW 5.68.010(2). The media does not waive the privilege by publishing information. RCW 5.68.010(4). Thus, the shield law appropriately sets a high bar before a litigant may compel the news media to testify or produce news gathering materials.

A. A YouTube Channel is not a Media Entity.

Under the trial court's broad interpretation of "news media," an individual person's YouTube channel is a media entity and the person owning the channel is indistinguishable from that entity. CP 425. This interpretation defies common sense and the statute's plain language.

1. A person invoking the shield law must have obtained the information at issue while serving as a media entity's employee, agent or contractor.

RCW 5.68.010(5) defines "news media" as:

(a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;

(b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or

(c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.

Thus, only a media entity, a person who worked for that entity, or a related corporation may invoke the shield law. RCW 5.68.010(5).

Here, the shield law was invoked by a person (Brian Green) in order to obtain records under RCW 42.56.250(8), which is a “news media” exception to a disclosure exemption for certain records.¹ The case turns on the shield law’s definition of “news media” because, unfortunately, the Legislature required “news media” status to access the records at issue.² Thus, Mr. Green is entitled to the records only if he: 1) is a “person who is or has been an employee, agent, or independent contractor of” a “newspaper, magazine or other periodical... or any entity that is in the regular business of news gathering and disseminating news or information to the public”; and 2) “is or has been engaged in bona fide news gathering for such entity”; and 3) made the records request “while serving in that capacity.” RCW 5.68.010(5)(a) and (b); RCW 42.56.250(8).

2. A YouTube channel is not like the listed entities.

In the trial court, Mr. Green argued that his YouTube channel is an “entity in the regular business of news gathering and disseminating

¹ Mr. Green identified himself as an investigative journalist when requesting photos and birth date records of the jail personnel and deputies on duty when he was arrested. Resp. Brief pp. 3-4. Mr. Green, not any YouTube entity, brought this action under the Public Records Act.

² Amici support Mr. Green’s right to scrutinize and criticize the government, and regret that this case will not change the Legislature’s policy to give the news media special access to records. Stretching the shield law to cover virtually any self-identified journalist is the wrong way to address this concern. The Legislature should amend the Public Records Act to treat requesters equally.

news or information to the public” under RCW 5.68.010(5)(a). CP 421-422. The trial court defined such an entity as “anything similar to a newspaper, magazine, book publisher, news agency, wire service, radio or television station or network, or audio or audiovisual production company that, on a regular basis, has as its job or purpose the gathering and dissemination of news.” CP 425. The court found Mr. Green’s channel (called “Liberty’s Champion”) met that definition because it published videos on “roughly a weekly basis” for several years and had a purpose of gathering and disseminating news. *Id.*

A YouTube channel is not similar to a newspaper, periodical or other listed entity. It is not an entity at all, as the trial court implicitly recognized when describing Liberty’s Champion as indistinguishable from the person who owns it. A personal YouTube channel is simply a social media account subject to the terms and conditions of the social media platform owner. It is more akin to newspaper advertising, printed with permission, than a newspaper.

a. *YouTube is an open, shared platform.*

Courts have described YouTube as a wide-open platform for anyone agreeing to its terms. “‘YouTube’ is a social media platform for viewing and sharing videos.” *Watness v. City of Seattle*, 11 Wn. App.

2d 722, 728, 457 P.3d 1177 (2019). “YouTube is ‘the world’s largest forum in which the public may post and watch video-based content.’”

Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020).

“Around 400 hours of video content are uploaded to the platform hourly. Indeed, ‘more video content has been uploaded’ to YouTube ‘than has been created by the major U.S. television networks in 30 years.’” *Id.* “YouTube invites the public to post video and other content on its platform and is ‘committed to fostering a community where everyone’s voice can be heard.’” *Id.*

Although it fosters public speech, YouTube is itself a private entity owned by Google. *Prager Univ.* at 996-997. Users must accept community guidelines and terms of service before posting videos, and “YouTube has reserved the right to remove or restrict content.” *Id.* at 995.

None of the news media entities listed in the shield law rely on platforms like YouTube to disseminate news. Rather, newspapers, magazines, book publishers, radio and TV stations, news agencies, wire services, cable networks and production companies have their own branded web sites, scheduled broadcasts and publications over which they have exclusive control. Thus, an individual’s video-sharing

channel on YouTube is not “similar to” a newspaper, TV station or other listed entity, and does not fit the definition of “news media.”³

As a New Jersey court explained in *J.O. v. Township of Bedminster*, 433 N.J. Super. 199, 214 (2013), a cell phone “can be used to record a kitten who refuses to leave a warm bath, producing a video seen by close to four million people on YouTube.” Although it could be argued that the person who took the video was protected by a New Jersey law restricting search and seizure of news gathering materials, “we are confident that the Legislature did not intend to provide protection above and beyond that provided by the Fourth Amendment to someone based upon the posting of a video of a wet kitten on the Internet.” *Id.*

b. *A YouTube channel is a not a newspaper.*

On appeal, Mr. Green makes a new argument that his YouTube channel is a newspaper, citing Dictionary.com and his approximately weekly posting of videos containing news and opinion. Resp. Brief pp. 228. There is a statutory definition of “newspaper” in Washington which a YouTube channel does not fit. Under RCW 82.04.214:

³ While YouTube itself is an entity and might claim to be a media entity for purposes of the relevant statute, it has not done so, is not a party to this proceeding, and does not employ Mr. Green.

- 1) "Newspaper" means:
 - (a) A publication issued regularly at stated intervals at least twice a month and *printed on newsprint* in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper; and
 - (b) An electronic version of a printed newspaper that:
 - (i) Shares content with the printed newspaper; and
 - (ii) Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper.

Thus, to be a newspaper in Washington, there must be a newsprint version and not just an electronic version of the publication. RCW 82.04.214. A YouTube channel alone, without a printed complement, does not fit that definition.⁴

B. A Personal YouTube Channel Cannot Be an Employer or Principal.

For a “person” to invoke the media privilege, he or she must have obtained the subpoenaed information through “bona fide news gathering” as “an employee, agent, or independent contractor of” a news media entity. RCW 5.68.010(5)(b). Here the trial court held that Brian Green was an entity, rather than a person, because he “is” the YouTube channel. CP 425 (emphasis in original). The trial court ruled

⁴ Mr. Green also argues on appeal that his YouTube channel is a “periodical” because it is published at “fixed intervals.” Resp. Brief pp. 28-29. The trial court did not address this argument. CP 415-429. Amici take no position on whether Liberty’s Champion is a periodical but note that the shield law was invoked by a “person,” not an “entity,” in this case.

in the alternative that Mr. Green is an “agent” of his own YouTube channel.

A person cannot be an agent or employee of that person’s own YouTube channel. That is like saying that a person is an agent of his or her own bank account and the account, as principal, controls the account holder. It is backwards.

The term “agent” is defined generally as a “person authorized by another to act for him.” *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn. 2d 514, 522, 22 P.3d 795 (2001), citing Black's Law Dictionary 85 (4th ed.1951). “An agency is created by the actions of two parties.” *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn. App. 637, 645, 898 P.2d 347 (1995), citing *Ford v. United Brotherhood of Carpenters and Joiners of Am.*, 50 Wn.2d 832, 838, 315 P.2d 299 (1957). “The agent manifests a willingness to act subject to the principal's control, and the principal expresses consent for the agent to so act.” *Id.*

A YouTube channel cannot be a principal. It is a social media account belonging to whomever opened it for video-sharing purposes. It is not a party or a person with the ability to act or consent. Affirming the trial court’s reasoning would permit anyone regularly posting

information through a social media account to invoke the media privilege on the theory that the person's account is a media "entity" and that it somehow controls that person's actions.

C. News Media Status Does Not Hinge on Intent.

Pierce County and its supporting amicus party, the Pierce County Corrections Guild, suggest that Brian Green's motivation for requesting public records was personal rather than journalistic. Opening Brief pp. 43-44; Guild Am. Brief p. 3. The Corrections Guild argues that the term "bona fide news gathering" requires an inquiry into the good faith of the person claiming the media privilege. Guild Am. Brief pp. 9-10. Addressing this issue, the trial court said "the only test of good faith that is apparent to this Court is whether a good faith desire to gather news is at least a factor in the conduct at issue." CP 427 (emphasis in original). The court found that test was satisfied because a desire to disseminate the requested photos and birthdate records on Liberty's Champion was consistent with the "nature of the news" on the channel. *Id.*

Amici take no position on Mr. Green's intentions, and object to this line of inquiry. First, as illustrated by this case, it is easy to establish a genuine intention to gather news for the purpose of posting

it on a social media platform. If the county and guild want to interpret “news media” narrowly so as to limit access to public records, focusing on the requester’s subjective intentions is unlikely to accomplish that (particularly since the county has the burden of proof in a Public Records Act case). RCW 42.56.550(1). More importantly, probing a reporter’s motives for obtaining information is intrusive, and contradicts the purpose of the shield law to prevent government interference with news gathering. When a media entity such as a radio station or newspaper gathers information through an employee, free-lancer or news intern, the entity-person nexus required by RCW 5.68.010(5)(b) is clear, and there is no need for courts or litigants to examine the individual journalist’s thought process.

Also, the shield law does not mention good faith. RCW 5.68.010. It says a news media employee or agent must have engaged in “bona fide news gathering” for the employing entity in order to invoke the privilege. RCW 5.68.010(5)(b). The term “bona fide” is not defined. Interpreting the similar phrase “bona fide newspaper” in the Investment Adviser Act, the U.S. Court of Appeals looked at the context in which the term was used – exempting certain newspapers from disclosure requirements for investment advisers – and held that

“bona fide” in that context meant not engaging in prohibited advising practices. *Securities and Exchange Commission v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1377 (2nd Cir. 1970). The Court said:

The phrase ‘bona fide’ newspapers, in the context of this list, means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred.

Id. at 1377.⁵ In other words, the focus is on the actual activity, not the stated intent. Applying that reasoning here, the phrase “bona fide news gathering” in the context of RCW 5.68.010(5)(b) means staying within the scope of employment or principal-agent relationship with a media entity. The statute requires a nexus between the news media entity defined in RCW 5.68.010(5)(a) and the person who claims a privilege for news gathering under RCW 5.68.010(5)(b). In sum, the “news media” definition hinges on whether the sought information is gathered in the scope of employment or agency for a qualifying media entity, and not on a person’s subjective intent.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court.

⁵ Publications may be part of the “press” for constitutional purposes but not “bona fide newspapers” under the Act. *Id.* at 1379.

Dated this 14th day of September 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 14, 2020, I served a copy of the foregoing memorandum and related Motion for Leave to File an Amicus Curiae Memorandum to registered parties via the Washington Supreme Court electronic filing system.


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